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In the

Supreme Court of the United States

OCTOBER TERM, 1965

No. ~~1316~~ 1316

JACK CARROLL SMITH and
THOMAS EDWARD BANNON,

Petitioners,

v.

THE STATE OF TEXAS,

Respondent.

Petition for Writ of Certiorari to the Court of Criminal Appeals of Texas

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Petitioners pray that a Writ of Certiorari issue to review a judgment of the Court of Criminal Appeals of Texas entered in Cause Number 38,575, styled Thomas Edward Bannon, Appellant v. The State of Texas, Appellee, and Cause Number 38,576, styled Jack Carroll Smith, Appellant v. The State of Texas, Appellee, on December 8, 1965, Motion For Rehearing being denied in said causes consolidated on appeal on February 2, 1966, by written opinion. The Second Motion For Rehearing of Petitioner was denied without written opinion on March 9, 1966. A copy of the original and con-

curring opinion is included herein as Appendix A, and of the Opinion and dissenting opinion on Motion For Rehearing as Appendix B.

The Honorable Hugo L. Black granted Petitioners, on April 12, 1966, a Stay of the Mandate of the Texas Court of Criminal Appeals pending the timely filing and disposition of a Petition for Writ of Certiorari.

JURISDICTION

The jurisdiction of this Court to review the case on Petition for Writ of Certiorari rests upon 28 U.S.C., Section 1257(3).

QUESTIONS PRESENTED

1. Whether or not Petitioners' rights under the Fourteenth Amendment to the Constitution of the United States were violated by the comment of the Prosecutor during oral argument on Petitioners' failure to testify?

   (a) Whether the remarks of the Prosecutor in oral argument constituted a comment on Petitioners' failure to testify?

2. Whether or not Petitioners' rights under the Fourteenth Amendment to the Constitution of the United States were violated by the admission of the oral confessions of Petitioners made in absence of counsel and without advice as to their right to counsel under the Sixth and Fourteenth Amendments to the Constitution of the United States?

STATUTES INVOLVED

The statutory provisions involved are Article 1422 of the Texas Penal Code (Appendix C) and Article 710 of the Texas Code of Criminal Procedure of 1925 (Appendix D).

STATEMENT OF THE FACTS

Petitioners were separately charged by information, but were convicted upon a joint trial for misdeameanor theft under Article 1422 of the Penal Code of Texas; the punishment for each being assessed at thirty (30) days in jail and a fine of One Hundred Dollars ($100.00). This conviction was affirmed by the Court of Criminal Appeals of Texas by written opinion on December 8, 1965. Motion For Rehearing was denied by written opinion on February 2, 1966. Petitioners' Second Motion For Rehearing was denied on March 9, 1966, without written opinion. Petitioners' moved for a Stay of the Mandate pending a granting of the Stay by this Court, the Mandate being Stayed by the Texas Appellate Court until April 30, 1966. Thereafter, this Court on April 12, 1966, entered its Order Staying the Mandate of the Texas Court of Criminal Appeals.

Under the facts adduced at the trial of the cases, the manager of an apartment unit testified that shortly after midnight, he saw an automobile occupied by two men parked near the rear of the apartment house; that after a brief time and from a distance of ten feet, he saw such automobile parked in the driveway in front of the apartment house; the owner of the apartment house noticed that some furniture was missing from an unoccupied apartment of the ag-